90-34

No. _____

Supreme Court, U.S.
FILED
JUL 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION,

Petitioner,

—v.—

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER), *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 3, 1990

QUESTIONS PRESENTED

1. Should this Court resolve the direct conflict among the Second, Fifth, Ninth and Eleventh Circuits and establish a uniform rule concerning whether admiralty jurisdiction exists on claims by agents who procure necessary marine services and/or supplies for vessels in the maritime commerce of the United States?

2. Should this Court overrule, or at least limit, its much criticized one page opinion in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855), which refused to recognize admiralty jurisdiction on a suit involving an agency contract calling for necessary marine services and supplies to be delivered to a vessel in the maritime commerce of the United States?

LIST OF PARTIES

The parties to the proceedings below are those set forth in the caption. The following statement is provided in accordance with Rule 29.1 of the Rules of the Supreme Court of the United States.

Petitioner Exxon Corporation has no corporate parent. The subsidiaries which it directly or indirectly owns by less than one hundred per cent are listed in Appendix D. (A-36).

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List Of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions	2
Statement Of The Case	3
Reasons For Granting The Writ	4
Conclusion	12
Appendix A—*Exxon Corporation v. Central Gulf Lines, Inc.*, No. 89-7986, 89-7988 (2d Cir. April 5, 1989)	A-1
Appendix B—*Exxon Corporation v. Central Gulf Lines, Inc.*, 717 F. Supp. 1029 (S.D.N.Y. 1989)	A-3
Appendix C—*Exxon Corporation v. Central Gulf Lines, Inc.*, 707 F. Supp. 155 (S.D.N.Y. 1989)	A-22
Appendix D—List of subsidiaries which Exxon Corporation directly or indirectly owns by less than one hundred per cent	A-36

TABLE OF AUTHORITIES

Cases

	PAGE
Ameejee Valleejee and Sons v. M/V VICTORIA U., 661 F.2d 310 (4th Cir. 1981)	7
Archawski v. Hanioti, 350 U.S. 532 (1956)	8
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)	8
Compagnia Maritima La Empresa, S.A. v. Pickard, 320 F.2d 829 (5th Cir. 1963)	7
Compania Anonima Venezolana De Navegacion v. A.J. Perez Export Co., 303 F.2d 692 (5th Cir. 1962).	8-9
E.S. Binnings, Inc. v. M/V SAUDI RIYADH, 815 F.2d 660 (11th Cir. 1987)	7
Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982)	11
Gulf Trading & Transport Co. v. VESSEL HOEGH SHIELD, 658 F.2d 363 (5th Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982)	10
Hadjipateras v. Pacifica, S.A., 290 F.2d 697 (5th Cir. 1961)	6, 8
Hinkins Steamship Agency, Inc. v. Freighters, Inc., 351 F. Supp. 373 (N.D. Cal. 1972), *aff'd*, 498 F.2d 411 (9th Cir. 1974)	6
Krauss Bros. Lumber Co. v. Dimon S.S. Corp., 290 U.S. 117 (1933)	9
Minturn v. Maynard, 58 U.S. (17 How.) 477 (1855)	*passim*

	PAGE
Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp., 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985)	4, 5, 6, 7, 9
Sisson v. Ruby, 58 U.S.L.W. 4941 (U.S. June 25, 1990)	11
Swift & Co. Packers v. Compania Colombiana Del Caribe S.A., 339 U.S. 684 (1950)	9

Statutes

United States Constitution, Article III, Section 2, Clause 1	2
Judicial Code, 28 U.S.C. § 1333 (1949) (corresponds to The Judiciary Act of 1789, Section 9, 1 Stat. 76-77)	2-3
28 U.S.C. § 1254(1) (1982)	2
United States Maritime Lien Act, 46 U.S.C.A. §§ 31305-31307, 31341-31342	3, 10

Treatises

1 S. Freidell, *Benedict on Admiralty* § 105 (7th ed. 1989)	9
7A J. Moore & A. Palaez, *Moore's Federal Practice*, ¶ .250 (2d ed. 1988)	9
G. Gilmore & C. Black, *The Law of Admiralty* §§ 1-10, 9-34 (2d ed. 1975)	9, 11

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EXXON CORPORATION,

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—v.—

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER), *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Exxon Corporation, respectfully prays that a writ of certiorari be issued to review a portion of the Summary Order of the United States Court of Appeals for the Second Circuit, entered in these proceedings on April 5, 1990.

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit was not reported but is reprinted in the Appendix hereto as Appendix A.

The opinions of the United States District Court for the Southern District of New York are reported at 717 F. Supp.

1029 and 707 F. Supp. 155 and are reprinted in the Appendix hereto as Appendices B and C, respectively.

JURISDICTION

The Order of the Court of Appeals was entered on April 5, 1990 affirming the judgment below. This Petition for a Writ of Certiorari was filed within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article III, Section 2, Clause 1, provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State, —between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, the Citizens thereof, and foreign States, Citizens or Subjects.

The Judicial Code, 28 U.S.C. § 1333 (1949) (corresponds to The Judiciary Act of 1789, Section 9, 1 Stat. 76-77), provides that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and in all proceedings for the condemnation of property taken as prize.

STATEMENT OF THE CASE

I. The Facts

Respondent Central Gulf Lines, Inc. ("Central Gulf") was the owner of the United States flag cargo vessel M/V GREEN HARBOUR (ex WILLIAM HOOPER) (the "Vessel"). Central Gulf bareboat chartered the Vessel to Waterman Steamship Corporation ("Waterman") for use in Waterman's United States flag commercial liner service between ports in the United States and the Middle East, including Saudi Arabia.

Exxon Corporation ("Exxon") was the supplier to Waterman of marine fuels for many years. Under its supply contract with Waterman, Exxon provided marine fuel either itself or through local supplying companies.

Exxon agreed with Waterman to effect supplies of fuel to the Vessel, on credit, at both Jeddah, Saudi Arabia and the Port of New York. Exxon directly supplied the fuel to the Vessel at New York on October 7, 1983. At Jeddah, Exxon ordered the fuel from a local supplier, which delivered it to the Vessel on October 26, 1983. Respecting the Jeddah delivery, Exxon was invoiced by the local supplier and Exxon paid the invoice. Exxon invoiced Waterman for both deliveries but Exxon was not paid by Waterman.

II. The Proceedings Below

Exxon commenced this litigation to enforce Exxon's maritime lien claims against the Vessel. Exxon brought suit under both the General Maritime Law and the United States Maritime Lien Act, 46 U.S.C.A. §§ 31305-31307, 31341-31342. Exxon moved for summary judgment arguing that United

States law applied and that it was entitled to judgment as a matter of law. Central Gulf cross-moved for summary judgment.

In an opinion and order dated March 3, 1989 (A-22), the district court agreed that United States law applied. The court held that Exxon's claim for the New York delivery was within admiralty jurisdiction and granted judgment in favor of Exxon. The court concluded, however, that Exxon acted as an agent with respect to the fuel delivered at Jeddah. The court held that because Exxon acted as an agent, Exxon's claim for the Jeddah delivery was outside admiralty jurisdiction and dismissed its claim relying on the Second Circuit's decision in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985) and this Court's decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855).

Exxon moved for reconsideration by the district court, arguing, *inter alia*, that Exxon was a seller to Waterman rather than Waterman's agent. In an opinion and order dated July 21, 1989 (A-3), the district court denied Exxon's motion for reconsideration, again based on the Second Circuit's decision in *Peralta* and this Court's decision in *Minturn*.

In a Summary Order dated April 5, 1990, the Second Circuit affirmed the judgment of the district court "substantially for the reasons given" in the two district court opinions. (A-1). Exxon seeks a writ of certiorari respecting that portion of the Summary Order sustaining the denial of admiralty jurisdiction on the claim for the Jeddah delivery.

REASONS FOR GRANTING THE WRIT

The lower court opinions held that Exxon acted as an agent and hence its claim was outside admiralty jurisdiction based on *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985). *Peralta*, in turn, was based on this Court's one page decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855).

In *Minturn*, this Court held, apparently on the then prevalent view that certain types of relief were not available in admiralty, that an action by a "general agent or broker" against the vessel owner for money expended for vessel repairs, supplies and services was outside admiralty jurisdiction. This Court stated: "[t]he libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action of *assumpsit*, in a common law court, is the proper remedy." *Id.* at 477.

I. Conflict in The Circuits Over *Minturn*

The circuits have been and continue to be in conflict on the viability of the *Minturn* rule. As Justice Blackmun stated in his dissent from the denial of certiorari[1] in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031, 1033-4 (1985):

> Not only is the *Minturn* rule of dubious validity, but in efforts to narrow its application, the Courts of Appeals have developed a number of equally questionable exceptions to the rule that have created confusion and disagreement.
>
> * * *
>
> The conflict between the approaches to this question taken by the Courts of Appeals is reason enough to grant this petition, for uniformity and predictability in the maritime industry were the ends sought in the Constitution when federal-court maritime jurisdiction was created in the first instance. A substantial argument has been advanced that the rule established in *Minturn* improperly excludes from federal maritime jurisdiction disputes that directly concern the business of maritime commerce. In light of the strength of that argument, of

1 Three of eight Justices would have granted certiorari in *Peralta*. Justice Marshall joined in Justice Blackmun's dissent. Justice Brennan, without joining the dissent, also voted to grant certiorari. Justice Powell took no part in the consideration of the petition.

the confusion and conflict in the courts, and of the need for a uniform rule, I would grant this petition.

A. *Minturn* in the Second Circuit

The Court of Appeals for the Second Circuit has "faithfully adhered to the *Minturn* holding" although recognizing its "erosion in other circuits" and "welcom[ing]" its demise by this Court. *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798, 802-4 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985). In *Peralta*, the Second Circuit held there was no admiralty jurisdiction on a claim brought under an agency contract which provided for the agent to perform a wide variety of services to vessels calling at United States Gulf ports.

B. *Minturn* in the Ninth Circuit

In *Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 351 F. Supp. 373 (N.D.Cal. 1972), *aff'd*, 498 F.2d 411 (9th Cir. 1974) the Ninth Circuit found that admiralty jurisdiction existed in an agent's suit for a balance due for a variety of marine services rendered to a vessel arranged through the agent. The *Minturn* rule was rejected by the Ninth Circuit with the comment that *Minturn* and other such cases "[u]nder more modern decisions" are "of doubtful validity." 498 F.2d at 412.

C. *Minturn* in the Fifth Circuit

The Fifth Circuit has held, despite *Minturn*, that admiralty jurisdiction exists in a suit under a managing agency contract pursuant to which the managing agent procured freight contracts, collected freights, paid operating expenses and remitted profits to the shipowner. *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961). The Second Circuit has acknowledged that it considers actions on such contracts outside admiralty on the basis of *Minturn*. In commenting on its prior decisions involving managing agency contracts, the Second Circuit stated in *Peralta* that there is "no material distinction" between a managing agency contract and the agency contract involved in that case. *Peralta*, *supra*, 739 F.2d at 804.

D. *Minturn* in the Eleventh Circuit

Since *Peralta*, the issue has continued to arise. *E.S. Binnings, Inc. v. M/V SAUDI RIYADH*, 815 F.2d 660 (11th Cir. 1987) involved an agency agreement under which the agent arranged cargo bookings and performed documentation, financial and husbanding services for vessels. The district court in that case adopted the rule that admiralty jurisdiction existed based on the above decisions from the Fifth and Ninth Circuits. The Court of Appeals for the Eleventh Circuit reversed, adopting the Second Circuit's view of *Minturn*. The Eleventh Circuit noted "that the rule that such contracts are not within the admiralty jurisdiction has been condemned by commentators" but only the "Supreme Court is the appropriate court" to overrule *Minturn*. *Id.* at 665 n.4. It also lamented that this Court had recently "declined to pick up the gauntlet." *Id.*

E. Special/General Agents

A number of circuits have added to the confusion concerning the *Minturn* rule by distinguishing between "special" and "general" agents, holding that admiralty jurisdiction exists where the agent is merely a "special" one. Cases adopting this rule include *Ameejee Valleejee and Sons v. M/V VICTORIA U.*, 661 F.2d 310 (4th Cir. 1981) and *Compagnia Maritima La Empresa, S.A. v. Pickard*, 320 F.2d 829 (5th Cir. 1963). The district court in the case at bar rejected the special agent/general agent distinction. (A 12-16).

II. *Minturn* Should Be Overruled Or At Least Limited

Minturn should be overruled because it is based on an anachronistic premise and because an agency relationship involving the supply of necessaries to a vessel is an integral part of the shipping industry and thus should be within admi-

ralty jurisdiction. Furthermore, the exclusion of claims based on such relationships is directly contrary to a major policy concern underlying the grant of federal admiralty jurisdiction—the need for uniformity of law and the protection of the shipping industry and maritime commerce.

A. *Minturn*'s Rationale Is Anachronistic

In *Minturn*, this Court dismissed the agent's claim on the ground that it was nothing more than an action of "assumpsit," the jurisdiction for which rested in the common law court. Since *Minturn*, this Court has eschewed such a narrow view of admiralty jurisdiction. In *Archawski v. Hanioti*, 350 U.S. 532, 535-6 (1956) this Court stated that: "[t]he philosophy of *indebitatus assumpsit* is, indeed, not wholly foreign to admiralty. . . . Rights which admiralty recognizes as serving the ends of justice are often indistinguishable from ordinary quasi-contractual rights created to prevent unjust enrichment." As Judge John R. Brown, who has been called "our leading admiralty authority,"[2] observed in *Hadjipateras*, *supra*, 290 F.2d at 704-5:

> If, because the process of adjudication goes a step beyond 2 plus 2, the admiralty loses power, we would have the spectacle of things essentially maritime and thereby automatically within the constitutional supremacy clause, *Kossick v. United Fruit Co.*, 1961, 81 S. Ct. 886, being forced into common law, or equity, courts for determination. Indeed, it would be even more absurd. It would, barring the accident of diversity of citizenship, send essentially federal problems to state courts . . . .

In fact, the availability of equitable relief in admiralty is now well established. As Judge Brown colorfully noted in *Compania Anonima Venezolana De Navegacion v. A.J. Perez Export Co.*, 303 F.2d 692 (5th Cir.) *cert. denied*, 371 U.S. 942 (1962): "The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his land-locked brother, that which equity and good conscience impels." 303 F.2d at 699 (footnote and citations omitted). *See also Swift & Co. Packers v. Compania Colombiana Del Caribe S.A.*, 339 U.S. 684, 691-2 (1950); *Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117, 124 (1933).

2 *Chevron Oil Co. v. Huson*, 404 U.S. 97, 115 (1971).

B. Commentator Criticism of the *Minturn* Rule

Quite apart from the basis of *Minturn* being anachronistic, the leading commentators have sharply criticized the *Minturn* rule as being an "anomalous exception" to admiralty jurisdiction and of "dubious defensibility." G. Gilmore & C. Black, *The Law of Admiralty*, 22, 28 n.94b (2d ed. 1975). They also state: "It is predicted that the Supreme Court, when the issue reaches it, will hold 'general agency' and other vessel-management agreements within the jurisdiction—along with actions for accountings on them." *Id.* at 28 n.94b.

Similarly, Professor Moore characterizes the distinctions in this area as "contrived and not based upon sound policy," 7A J. Moore & A. Palaez, *Moore's Federal Practice*, ¶ .250, 3003 (2d ed. 1988) and concludes respecting agency and brokerage contracts: "[q]uite clearly, such agreements are an integral part of, and in furtherance of, maritime commerce and, consequently, should be cognizable within the admiralty jurisdiction of the district courts." *Id.* at 3006.

C. Uniformity of Maritime Law

The Constitutional grant of admiralty jurisdiction was made to harmonize admiralty law among the several states. 1 S. Freidell, *Benedict on Admiralty* § 105 (7th ed. 1989). Indeed, "uniformity and predictability in the maritime industry were the ends sought in the Constitution . . . ." *See* Justice Blackmun's dissent from the denial of certiorari in *Peralta*, *supra*, 470 U.S. at 1034.

Minturn disrupts such uniformity and predictability. Given the conflicting approach of the lower courts, an agent arrang-

ing on its credit for identical supplies or services to two vessels may be subject to two differing views of *Minturn*, depending upon where the agent brings suit, or can bring suit, for reimbursement. The agent may acquire a federal lien claim against one of the vessels, for example where suit is in the Fifth or the Ninth Circuits. As to the other vessel, however, the agent may well be relegated to state law and state remedies, and be deprived of the benefit of the federal judiciary's expertise in maritime matters. If the *Minturn* rule as originally announced holds sway, all agents in all cases will be left to state law and remedies, which vary from state to state. The need for a single, uniform, national rule, both to protect the American maritime service industry and to promote orderly interstate and international maritime commerce is self-evident.

D. The *Minturn* Rule Fails to Protect a Class That Is Critical to Maritime Commerce

The 1971 Amendments to the United States Maritime Lien Act, formerly 46 U.S.C. §§ 971-976, now codified at 46 U.S.C.A. §§ 31305-31307, 31341-31342 (the "Lien Act"), were propelled by strong public policy in favor of those who provide necessary services or supplies to vessels in the maritime commerce of the United States. *Gulf Trading & Transport Co. v. VESSEL HOEGH SHIELD*, 658 F.2d 363 (5th Cir. 1981) (Brown, J.), *cert. denied*, 457 U.S. 1119 (1982). In large measure, the purpose of the Lien Act is to protect such persons by granting them maritime liens against the vessels supplied. Thus, the Act has the salutary effect of insuring that credit for necessary services or supplies flows to vessels in maritime commerce, thereby promoting the servicing of vessels in a speedy and efficient manner. *See* 658 F.2d at 367.

Under the *Minturn* rule, an agent who arranges, on his own credit, a wide array of critical supplies and services for a vessel, thereby performing a key role in keeping the vessel trading in maritime commerce, is denied federal lien protection. On the other hand, a non-agent who provides a single

service to a vessel, no matter how insignificant,[3] obtains federal lien protection. This result defies common sense. The *Minturn* rule should, at the very least, be limited so that admiralty jurisdiction and its lien remedies apply in the case where an agent arranges basic marine services or supplies to a vessel and pays for them out of the agent's funds.

Faced with the denial of federal maritime lien protection under the *Minturn* rule, an agent has to decide whether it should arrange for vessel services or supplies without first having received cash in hand from the principal/vessel owner. Furthermore, if the provision of vessel services or supplies appears to be exhausting such cash in hand, then the agent must either take the risk of not being adequately secured for monies expended on behalf of the principal/vessel owner, or order that the provision of services or supplies cease. Expeditious provision of services and/or supplies is critical to maritime commerce, as modern commercial vessels can load and discharge their cargo at any single port in less than twenty-four hours. The *Minturn* rule fails to give protection to a vital segment of maritime commerce. Such protection is, as this Court has recently recognized, "at the heart of admiralty jurisdiction." *Sisson v. Ruby*, 58 U.S.L.W. 4941, 4942 (U.S. June 25, 1990); *see also Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674 (1982).

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3 Judicial interpretation of a "necessary" is extremely broad and has included spirits delivered to a pleasure yacht. G. Gilmore & C. Black, *The Law of Admiralty*, § 9-34, n.185 (2d ed. 1975).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review that portion of the judgment of the United States Court of Appeals for the Second Circuit relating to the Jeddah delivery.

Respectfully submitted,

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July 3, 1990

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed April 5, 1990

Nos. 89-7986, 89-7988

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of April, one thousand nine hundred and ninety.

PRESENT:

HONORABLE WILFRED FEINBERG
HONORABLE GEORGE C. PRATT
HONORABLE JOHN M. WALKER, JR.
Circuit Judges

EXXON CORPORATION,

Plaintiff-Appellant,
Cross-Appellee,

—against—

CENTRAL GULF LINES, INC., et al.,

Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

UPON CONSIDERATION WHEREOF, it is hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED.

1. Plaintiff-appellant and cross-appellee Exxon Corporation (Exxon) appeals from that portion of the judgment of the United States District Court for the Southern District of New York, entered on the opinions and orders of William C. Conner, J., that dismissed its claim for a maritime lien for a supply of bunker oil in Jeddah, Saudi Arabia, against defendants-appellees and cross-appellants Central Gulf Lines, Inc. (Central), in personam, and the M/V Green Harbour ex William Hooper (the Hooper) and a letter of credit, in rem, for lack of admiralty jurisdiction. Central et al. cross-appeal from that portion of the judgment granting Exxon's claim for a lien with respect to the delivery of bunker oil in New York.

2. The judgment of the district court is affirmed, substantially for the reasons given in Judge Conner's two thorough opinions reported at 707 F. Supp. 155 and 717 F. Supp. 1029.

/s/ WILFRED FEINBERG
WILFRED FEINBERG

/s/ GEORGE C. PRATT
GEORGE C. PRATT

/s/ JOHN M. WALKER, JR.
JOHN M. WALKER, JR.

Appendix B

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

July 21, 1989

No. 86 Civ. 9445 (WCC)

EXXON CORPORATION,

Plaintiff,

—v.—

CENTRAL GULF LINES, INC., in personam and the M/V GREEN HARBOUR (ex William Hooper) in rem, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., in rem.,

Defendants.

Nourse & Bowles, New York City, for plaintiff (Armand M. Pare, Jr., and Bradley F. Gandrup, Jr., of counsel.)

Bigham Englar Jones & Houston, New York City, for defendants (Francis A. Montbach, and Karin A. Schlosser, of counsel.)

OPINION AND ORDER

WILLIAM C. CONNER, *District Judge.*

Plaintiff Exxon Corporation ("Exxon") moves for reconsideration of the Court's Opinion and Order, dated March 3, 1989, dismissing its claim for a maritime lien, under the Fed-

eral Maritime Lien Act (the "Act"),[1] for want of admiralty jurisdiction. *See Exxon Corporation v. Central Gulf Lines, Inc.*, 707 F.Supp. 155 (S.D.N.Y. 1989).

I have carefully considered "the matters [and] controlling decisions" which Exxon "believes the court has overlooked," Local Rule 3(j); *accord Ruiz v. The Commissioner of the Department of Transportation of the City of New York*, 687 F.Supp. 888, 890 (S.D.N.Y.), *aff'd* 858 F.2d 898 (2d Cir. 1988), but conclude that Exxon's claim was rightly dismissed.

BACKGROUND

Familiarity with my March 3, 1989 Opinion is presumed. Defendant Central Gulf Lines, Inc. ("Central Gulf") owns a vessel, the Green Harbour ex William Hooper (the "Hooper"), upon which plaintiff has asserted a lien. The Hooper was chartered by the Waterman Steamship Corporation ("Waterman"), which for forty years used Exxon as its exclusive worldwide supplier of bunkers.

Under the contract governing the relationship between Exxon and Waterman in 1983, Waterman's fuel requirements were provided by the "Seller" (Exxon) or by "Supplying Companies." Exhibit 3 to Affidavit of James E. Sharkey [hereinafter Waterman/Exxon Contract]. Waterman made purchases under this agreement by telephoning Exxon in New York and providing Exxon with delivery information. Exxon would affect delivery on its own, or cause a local supplier to deliver the bunkers to the vessel. Exxon would invoice Waterman for the fuel supplied, and if a local supplier was used, pay the supplier.

---

1 The Act provides, in pertinent part:

> Any person furnishing . . . supplies . . . or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

46 U.S.C. § 971.

The bunkers delivery which is the subject of this motion occurred on October 26, 1983, when the Hooper put in at Jeddah, Saudi Arabia. In order to fulfill its obligation to procure fuel for Waterman at that port, Exxon used a local supplier, Arabian Marine Operating Co., Ltd. ("Arabian Marine").

Exxon had promised Arabian Marine that it would "solicit and arrange for the sale of marine fuels to international customers having bunkering requirements at the port of Jeddah." In return for Exxon's services, Arabian Marine had agreed to pay Exxon on a "commission." Exhibit 4 to Affidavit of James E. Sharkey ¶¶ 1 & 5 [hereinafter Exxon/Arabian Marine Contract].

In my March 3, 1989 Opinion, I found that Exxon's agreement to procure bunkers for Waterman in Saudi Arabia was outside of the Court's admiralty jurisdiction. I observed that the Second Circuit in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir.1984), *cert. denied*, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985), had reaffirmed the rule that "agency contracts under which a party agrees to solicit or procure freight, passengers, crew, or supplies for a vessel are not maritime contracts," 707 F.Supp. at 159, and concluded that Exxon's services with respect to the Saudi Arabian delivery constituted such a preliminary contract:

> Under the contract, Exxon served in two distinct capacities. Its first role was as a supplier of marine fuels. When Waterman vessels called at ports where Exxon maintains its own bunker stations, Exxon promised to physically deliver the bunkers. When the vessels, however, called at ports where Exxon depends on local suppliers, Exxon promised to arrange for the local suppliers to provide Waterman ships with fuel. When acting in this latter capacity, Exxon was merely Waterman's agent.
>
> Exxon wore its agency hat when it procured bunkers for the Hooper in Jeddah. Its services with respect to the Jeddah delivery included taking Waterman's order,

> contacting Arabian Marine, maintaining a bunkers contract with Arabian Marine, and advancing Waterman the purchase price by paying Arabian Marine. It never actually possessed the fuel that was supplied to the Hooper at Jeddah. Indeed, pursuant to Exxon's contract with Arabian Marine, title to the fuel passed directly from Arabian Marine to the Hooper. In return for these services, Exxon received a commission which was deducted from Arabian Marine's invoice to Exxon. In sum, Exxon's role in the transaction was strictly "shoreside," *E.S. Binnings* [v. M/V Saudi Riyadh], 815 F.2d [660] at 664 [11th Cir.1987]. As Exxon put it in its discussion of the choice of law issue, the locus of Exxon's relationship with Waterman was the United States, not the dock in Jeddah. *See* Plaintiff's Memorandum of Law at 16. Exxon's services were thus "preliminary"; they ended before the bunkers reached the Hooper.

707 F.Supp. at 160.

DISCUSSION

Exxon offers four reasons why I erred in dismissing its lien on jurisdictional grounds: (1) Exxon sold the bunkers to Waterman; it was not Waterman's agent; (2) Exxon was not a general agent within the meaning of *Peralta*; it was a special agent and thus entitled to assert a maritime lien; (3) the Waterman/Exxon Contract was not a preliminary contract; and (4) Exxon extended credit to the Hooper, and can claim jurisdiction on that ground. Plaintiff also argues that "[i]n the event the Court considers no such lien exists . . . further evidence should be allowed on the nature of the Exxon/Waterman Fuel Oil Contract" and that "any question of Exxon's rights under Saudi [law] should be reserved." Plaintiff's Brief at 28-29. I will address each argument individually, and then briefly discuss the merits of Exxon's underlying claim.

I. *Agent or Seller*

Plaintiff first contends that the Waterman/Exxon Contract should be characterized as a sales contract, not an agency contract. "[A]t the very most a recasting of the contract would make any 'Supplying Company' a subcontractor of Exxon, and Exxon the contractor." Plaintiff's Brief at 9. I disagree.

It is well-settled that an agency relationship involves: (1) consent; (2) fiduciary duty; (3) absence of gain or risk to the agent; (4) control by the principal; and (5) power of the agent to alter the legal relations between the principal and third persons and between the principal and himself. *Boss v. Int'l Brotherhood of Boilermakers*, 567 F.Supp. 845, 847 n. 1 (N.D.N.Y.) (Miner, J.), *aff'd* 742 F.2d 1446 (1983), *cert. denied*, 469 U.S. 819, 105 S.Ct. 89, 83 L.Ed.2d 36 (1984); *Restatement (Second) of Agency* §§ 12, 13 & 14 (1958).[2]

It is sometimes difficult, however, to distinguish between a seller or supplier and a mere agent. The Restatement suggests that "[o]ne who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself." *Id.* § 14K. The comment to that section explains:

> Factors indicating that the one who is to acquire the property and transfer it to the other is selling to, and not acting as agent for, the other are: (1) That he is to receive a fixed price for the property, irrespective of the price paid by him. This is most important. (2) That he acts in his own name and receives the title to the property which he thereafter is to transfer. (3) That he has an independent business in buying and selling similar property. None of these factors is conclusive.

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2 Only the last three characteristics are at issue here. Since its relationship with Waterman is based on a contract, Exxon has not contended that consent is lacking. Moreover, presumably because fiduciary duty arises out of an agency relation, Exxon has not suggested that this element is absent.

Id. comment a.[3] As the factors listed above suggest, an important difference between sellers and agents is the manner in which risk of loss and opportunity for gain are distributed:

> Who is to be affected by the fluctuations of the price is often significant. If the one who is to supply the goods is to do so at a fixed price regardless of market fluctuations, there is strong evidence of a sale rather than of agency. Upon whose responsibility are the goods to be procured, is also a significant question. If they are to be obtained upon the credit of the person, who is to supply them without possibility of recourse to the person to whom they are to be supplied, this is also strong evidence of a sale. Who is to determine of whom, where, to what extent, upon what terms, the goods to be supplied are to be procured? If the person who is to supply them is to determine these matters, [then the transaction may be a sale].

1 F. Mechem, *Law of Agency* § 46 (1914).

After reviewing the terms of both contracts involved in this case, I remain convinced that the elements of an agency relationship are satisfied here. First, Exxon's likelihood of profit or loss was fixed. Although Exxon asserts that its responsibilities under the agreement was to "provide the minimum quantities of fuel irrespective of any difficulties it may have in obtaining the supplies," and that if it were an agent, it would have only had to use its "best efforts" to procure bunkers, Plaintiff's Brief at 5, Exxon's duties under the contract were in fact much less onerous then it claims. Practically, Exxon was only obligated to exercise its best efforts to procure fuel for Waterman. The contract permitted Exxon to escape performance where difficulties "not reasonably within [its] control" intervened and protected Exxon from fuel shortages caused by "any . . . event." Waterman/Exxon Contract § 6.7(C) & (D). Moreover, the contract insulated

3 Plaintiff asks the Court to consider the factors listed in the comment to Section 14J of the Restatement. Plaintiff's Reply Brief at 14-15. That subdivision is inapplicable, however, because it deals with distinguishing between an agent and a buyer, not an agent and a seller.

Exxon from shifts in the market price of fuel, by basing the price of the bunkers on the local supplier's price. *Id.* § 4.1 (Waterman was charged "the established selling price effective for the time and place of delivery by Seller or Supplying Company"); *see also* Exxon/Arabian Marine Contract ¶¶ 4 & 5 ("The product price to be invoiced to Exxon . . . shall be Arabian Marine's product selling price . . . at the time of delivery. . . . Payment for each marine fuel delivery is to be made by Exxon to Arabian Marine. . . . In return for services performed by Exxon, Arabian Marine will pay Exxon a commission. . . . [which] shall be deducted from the invoice issued by Arabian Marine and from Exxon's payment to Arabian Marine."); *Exxon*, 707 F.Supp. at 160 ("Exxon received a commission which was deducted from Arabian Marine's invoice to Exxon"). Since, as I noted in my previous Opinion, Exxon never held title to the fuel provided by the local suppliers, *Exxon*, 707 F.Supp. at 157, 160, the risk of loss shifted directly from the local supplier to Waterman. *See* Waterman/Exxon Contract § 6.7(E) (bunkers were "pumped at the risk and peril of Seller or Supplying Company up to that flange only").[4]

4 Exxon maintains that Section 2.1 of the Waterman/Exxon Contract gave rise to a "descriptive warranty" regarding the quality of the fuel delivered. *See* Plaintiff's Brief at 4. That Section provides:

> The Marine fuel to be sold hereunder shall be commercial grades of Bunker Fuel Oil and/or Intermediate Bunker Fuels and/or Marine Diesel Oil and/or Light Marine Diesel Oil and/or Marine Gas Oil offered at the time and place of delivery by Seller or by the Supplying/Delivering company. . . . Buyer shall have the sole responsibility for the selection and acceptance of Marine Fuel for use in the vessels to which Marine Fuel is delivered.

Nothing in this clause suggests that Exxon warranted the quality of fuel supplied by Arabian Marine. An express warrant by description is created only by the "seller." *See* N.Y.U.C.C. Law § 2-313 (McKinney 1964). When a local supplier was used, Exxon was not the "seller" within the meaning of the Uniform Commercial Code. *See id.* § 2-103(1)(d) (" 'Seller' means a person who sells or contracts to sell goods."); *id.* § 2-106 ("A 'sale' consists in the passing of title from the seller to the buyer for a price. . . ."). Moreover, if there were any doubt that Exxon did not warrant the quality of fuel delivered by local companies, the final sentence of Section 2.1 would put that doubt to rest.

Second, Exxon's performance under the contract was subject to Waterman's control. The gist of the contract was that, subject to minimum and maximum limits, Exxon would procure Waterman's fuel requirements. The only matter left to Exxon's discretion was which company would supply the fuel. This detail, however, was clearly immaterial to Waterman. Waterman was only interested in a worldwide supply of quality bunkers. It therefore retained control over fuel type and quality, as well as the method, location, and time of delivery. Waterman/Exxon Contract §§ 3.1 & 6.7(E).[5]

The Waterman/Exxon Contract empowered Exxon to alter Waterman's legal relationship with Arabian Marine. In the first place, the agreement authorized Exxon to "cause" local suppliers to sell fuel to Waterman. Waterman/Exxon Contract, preamble. Exxon could also obligate Waterman to indemnify the local supplier, *see, e.g., id.* § 6.2 ("Buyer shall reimburse Seller or Supplying Company for all additional expenses incurred in connection with" after-hour deliveries), and refrain from asserting certain claims against it, *see, e.g., id.* § 6.7(A) ("Buyer waives any claim against Seller or Supplying Company with respect to quality, quantity or price" not asserted within 45 days after delivery). Moreover, the

5 Plaintiff cites *Fenton v. Freedman*, 748 F.2d 1358 (9th Cir.1984), for the proposition that "if control may be exercised only as to the *result* of the services performed and not the means and methods by which it is accomplished, then the provider is an independent contractor and not an agent." *Id.* at 1362 (emphasis in original). This decision is based on California law, and I am not persuaded that the definition of agency is so limited under federal law. The only binding authority which plaintiff cites, *In re Shulman Transport Enterprises, Inc.*, 744 F.2d 293 (2d Cir.1984), is distinguishable. In that case, an airline claimed that a freight forwarder acted as its agent in collecting the carrier rates which the forwarder charged the shipper. The court rejected that claim on the ground that under the airline's contract with the forwarder, the airline had expressed no interest in how the forwarder used the funds it received from its customers. The Waterman/Exxon Contract, on the other hand, makes it clear that Exxon's local supplier could sue Waterman in the event it was not paid. *See* Waterman/Exxon Contract § 6.7(B) ("it is agreed that Seller and Supplying Company will have and may assert a lien against such vessel for the amount of the delivered price of said Marine Fuel").

local supplier did not only depend on Exxon's credit. Exxon could give the local supplier a lien on the vessel. *Id.* § 6.7(B). If, on the other hand, Arabian Marine had supplied the bunkers only on Exxon's credit, "without possibility of recourse" to the vessel, there would have been "strong evidence of a sale." 1 F. Mechem, *Law of Agency* § 46.

In sum, the language of the Waterman/Exxon Contract suggests that where Exxon depended on local suppliers, it was not a seller of marine fuel; it merely served as an agent, using its best efforts to procure bunkers that would satisfy Waterman's fuel requirements.[6]

II. *The Scope of the Peralta Rule*

When the Court of Appeals for the Second Circuit decided *Peralta*, it was presented with the option of distinguishing that case from the principle that preliminary contracts, and in particular general agency contracts, are not cognizable in the admiralty jurisdiction. The *Peralta* court acknowledged that this anomalous exception to the broad coverage of maritime jurisdiction had "suffered some erosion in other circuits," but stressed that "neither the Supreme Court nor the courts of this Circuit have departed from [the] teachings [of *Minturn* and its progeny]." 739 F.2d at 803; *see also id.* at n. 4. It eschewed any attempt "[t]o predicate jurisdiction on . . .

6 Exxon cites a number of cases that stand for the proposition that an independent contractor's use of a subcontractor does not transform it into an agent. *See Farwest Steel Corp. v. Barge Sea-Span 241*, 828 F.2d 522 (9th Cir. 1987), *cert. denied*, _____ U.S. _____, 108 S.Ct. 1594, 99 L.Ed.2d 909 (1988); *Marine Coatings of Alabama, Inc. v. United States*, 674 F.Supp. 819, 825 (S.D.Ala. 1987); *Spyral Marine Services, Inc. v. M.T. Silver Lady*, 82 Civ. 2313(ELP), Slip Op. (S.D.N.Y. January 31, 1983); *The Juniata*, 277 F. 438 (D.Md. 1922). Just because some independent contractors are not agents, and therefore entitled to sue in admiralty, does not mean that all independent contractors can bring such suits. An independent contractor may or may not be an agent. It is only colloquially that the terms are necessarily distinct. *Columbia Broadcasting System, Inc. v. Stokely-Van Camp, Inc.*, 522 F.2d 369, 375 & n. 14 (2d Cir. 1975). The large amount of control retained by Waterman and the lack of risk assumed by Exxon indicate that Exxon, whether or not an independent contractor, was an agent, not entitled to a maritime lien.

hair-splitting distinctions," since such an effort "would blur, if not obliterate a rather clear admiralty demarcation." *Id.* at 802. Although, the *Peralta* court hoped that the Supreme Court would eliminate the preliminary contract rule by granting *certiorari*, *id.* at 804, the Supreme Court declined the invitation, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985), and therefore left the law of this Circuit intact.

In its motion for reconsideration, plaintiff asks me to do what the Second Circuit refused to do in *Peralta*: Follow the other circuits which have carved exceptions out of the preliminary contract rule. I am convinced that further subdividing this area of the law would only serve to enhance confusion, and would violate the spirit of the *Peralta* decision.

A. Special/General Agent Distinction

Plaintiff argues that, at most, Exxon acted as Waterman's special agent, and cites cases distinguishing between special and general agents. I disagree with Exxon's contention that it was not a general agent.

Although the typical general agent in maritime cases performs husbanding services, as the Second Circuit has pointed out, *Ingersoll Milling Machine Co. v. M/V Bodena*, 829 F.2d 293, 302 (2d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 774, 98 L.Ed.2d 860 (1988), it is well settled that "[c]ontinuity of service rather than the extent of discretion or responsibility is the hall-mark of the general agency." *Restatement (Second) of Agency* § 3 comment a (1958); *accord Todd Shipyards Corp. v. The City of Athens*, 83 F.Supp. 67, 88 (D.Md.1949). A continuing relationship is particularly significant in maritime law, since a business relationship of substantial duration suggests an absence of reliance on a vessel's credit:

> The thing which characterizes a general agent as known in the maritime fraternity is a mutual interdependence on the financial credit and stability of each of the parties, agent and owner. The arrangement by its very nature contemplates that the agent must do many things in advance of the arrival or after the departure of the vessel. Reimbursement of his expenditures and the payment of his fees, whether by commissions on freight or otherwise, is not dependent upon the profitableness of that immediate venture. Here, on the other hand, this was a single-shot affair in which none of the parties dealt on the *credit* of the others. Presumably each took into account the general business integrity and reliability of the other.

Compagnia Maritima La Empresa, S.A. v. Pickard, 320 F.2d 829, 832 (5th Cir. 1963) (emphasis in original).[7]

Exxon was Waterman's sole procurer of bunkers for forty years. Moreover, its authority, with respect to the business of obtaining fuel for Waterman vessels, was quite broad. As plaintiff put it, "[i]t was Exxon who solely determined the physical supplier under the Contract . . . ; [and] it was Exxon who had the right to determine allocation of supplies in the event of shortage of oil among Exxon's various customers." Plaintiff's Reply Brief at 12. I am thus persuaded that plaintiff was Waterman's general agent with respect to fuel supplies.

Even if Exxon had acted as a special agent, I would dismiss this case for lack of subject matter jurisdiction, since special agents that provide preliminary services are outside the admiralty jurisdiction. As Exxon readily admits, Plaintiff's Reply Brief at 9 n. 4, I rejected the idea of a special/general agent distinction in my decision granting summary judgment in defendant's favor:

> "[I]t would be anomalous to hold that a general agency agreement" to, among other things, arrange for fuel

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7 Long-standing agency relationships are considered general agencies in admiralty law because the agent typically relies on the credit of his principal, rather than on that of the vessel. It does not follow, however, that an agent who serves a principal in a series of transactions can claim that he is a special agent or otherwise entitled to a lien if he can prove that he relied on the credit of the vessel. Such a standard would demand "unmanageable burdens of proof concerning the nature of the credit extended." Comment, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn.L.Rev. 595, 608 (1985). *But see M. Vivian Pierce*, 48 F.2d 644, 645 (D. Mass. 1931) (*dictum*).

> supplies "is outside admiralty, while an agreement between a principal" and an agent who has procured bunkers for the vessel "falls within the grant of jurisdiction." *See Continental Cameras Co. v. FOA & Son Corp*, 658 F.Supp. 287, 289 (S.D.N.Y.) (Sand, J.) (insurance broker), *aff'd* 831 F.2d 45 (2d Cir.1987) (per curiam); *see also Boyd, Weir & Sewell, Inc. v. Fritzen-Halcyon, Lijn, Inc.*, 709 F.Supp. 77 (S.D.N.Y.1989) (Cannella, J.) (chartering agent).

707 F.Supp. at 160-61. Exxon nevertheless argues that I overlooked case law recognizing such a distinction. Its primary support for this contention is a student-written article, Comment, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn.L.Rev. 596 (1985) [hereinafter Comment].

Yet, as the Comment itself points out, the Second Circuit has refused to distinguish between general and special agents. "The Second Circuit approach . . . views general agency agreements as equivalent to brokerage agreements and excludes both from admiralty." *Id.* at 623. "This confusion probably stemmed from the loose use of the word 'agent' as a practical equivalent of 'broker' in several early cases." *Id.* at 612. The Comment adds that, although there is one case, *P.T. Perusahaan Pelayaran Samudera Trikora Lloyd v. T.S. Salzachtal*, 373 F.Supp. 267 (E.D.N.Y. 1974), which allowed a special agent to assert a lien, this case "is an enigma in Second Circuit case law." Comment at 608 n. 53.

The Comment maintains, however, that the Second Circuit cases are wrongly decided. Thus the author claims that Judge Weinfeld's decision in *P.D. Marchessini & Co. v. Pacific Marine Corp.*, 227 F.Supp. 17 (S.D.N.Y.1964), "erroneously applied case law directed at brokers to exclude a general agent from admiralty." Comment at 614. And Judge Learned Hand's analysis in *Admiral Oriental Line v. United States*, 86 F.2d 201 (2d Cir.1936), is considered "similarly flawed." The Comment also states that Professor Moore "confuses the rights of general agents with those of brokers," since "of the ten cases cited [on this issue in his treatise], six are from the Second Circuit." Comment at 616 n.

86 (citing 7A J. Moore, A. Pelaez, *Moore's Federal Practice*, ¶ .250 n. 1 (2d ed.1983) [hereinafter *Moore's*]).

I decline to recognize a distinction that courts in this Circuit have eschewed for decades. Although there may be historical grounds to hold that special agency contracts are maritime, I am persuaded that differentiating between special and general agents would be irrational. As one commentator explained:

> To extend maritime jurisdiction to such a "specific" agent rather than to one who, on a continuing basis, procures all sorts of services, both necessary and unnecessary, is not a rational distinction. . . . A "specific" agent who merely procures services is performing shoreside preliminary functions, regardless of how necessary they are to the operation of the vessel. The decisions, therefore, have stressed the subject matter of the claim, i.e. the duties performed by the agent, rather than the nomenclature of the agent.

McAllister, *Admiralty Jurisdiction Extends to Agent Who Actually Performs Essential Services for Vessel*, 4 J.Mar.L. & Com. 480, 490 (1973).

Moreover, Judge Lumbard recently applied the *Peralta* rule to a case involving a special agent. In *Johnson Products Co. v. M/V La Molinera*, 619 F.Supp. 764 (S.D.N.Y.1985), a freight forwarder argued that the shipper's claims were "not within the Court's admiralty and maritime jurisdiction because they derive essentially from an agency relationship—not a maritime contract—between the plaintiffs and [the freight forwarder]." *Id.* at 765. Judge Lumbard agreed that this special agency contract was not maritime:

> As freight forwarder, ICS performed a variety of services preliminary to JPC's procurement of an actual carrier. Although the *carrier's* obligation to the shipper certainly comes within the Court's admiralty jurisdiction, the obligations arising out of preliminary procurement of and arrangement for carriage contracts do not. *See Peralta Shipping Corp. v. Smith Johnson (shipping)*,

739 F.2d 798 (2d Cir.1984); *P.D. Marchessini & Co. v. Pacific Marine Corp.*, 227 F.Supp. 17 (S.D.N.Y. 1964) (Weinfeld, J.).

Id. at 766-67 (emphasis in original). In sum, the *Peralta* rule is not limited to general agency contracts.

B. The Preliminary Contract Rule

Exxon contends that the Waterman/Exxon Contract was not a preliminary contract. First, it maintains that the preliminary contract rule and the general agency rule have been accidentally fused by the courts in this Circuit. *See* Plaintiff's Brief at 27. Again, however, Exxon's primary support is the student-written Comment:

> The court [in *Cory Bros. & Co. v. United States*, 51 F.2d 1010 (2d Cir.1931)] first cited in full that section of the *Thames* that called for the exclusion from admiralty of preliminary service contracts, a proper reference considering that the court was addressing the cargo broker aspects of the contract. The court immediately followed this reference, however, with the comment: *'Apparently the same ground explains the holding in Minturn v. Maynard.'* No single sentence in the entire body of case law concerning general agency agreements has done more to distort their proper interpretation; the *Cory Bros.* court, because of its complete misunderstanding of *Minturn*, carelessly merged two bodies of entirely unrelated case law.

Comment at 612-13 (emphasis in original; footnotes omitted), *quoted in* Plaintiff's Brief at 27-28.

It would be inappropriate for me to disentangle the preliminary contract rule from the general agency rule. The Second Circuit recently described the agency rule as a subset of the preliminary contract rule:

> A long-recognized principle for determining whether a contract is maritime is that agreements preliminary to maritime contracts are not cognizable in admiralty. . . .

> Applying this principle, our Court, despite questioning its continuing validity, has recently affirmed the long-standing, well settled rule laid down by the Supreme Court in *Minturn v. Maynard* . . . that general agency contracts are not cognizable in admiralty. . . .

Ingersoll Milling, 829 F.2d at 301-02. Moreover, I am not persuaded that the two principles should be distinct, since the agency exception to maritime jurisdiction is less of an anomaly when viewed as a subset of the preliminary contract doctrine.

Finally, the services performed by Exxon were merely preliminary. Exxon contends that since there was no written agreement between Waterman and Arabian Marine, the Waterman/Exxon Contract was not preliminary to a maritime contract. Plaintiff's Brief at 26. I disagree.

The Waterman/Exxon Contract authorized Exxon to create a contractual relationship between Waterman and Arabian Marine. Exxon agreed "to sell or cause [fuel] to be sold" to Waterman. Waterman/Exxon Contract, preamble. Where Exxon merely "caused" local suppliers to sell bunkers to Waterman, it promised to advance the suppliers payment for the fuel. In the event that Exxon defaulted, the local suppliers could look to Waterman. *Id.* § 6.7(B).

Moreover, the Exxon/Arabian Marine Contract "covers the solicitation of bunker customers by Exxon and *the sale and delivery of marine fuels as bunkers by Arabian Marine to such customers* at the port of Jeddah, Saudi Arabia." Exxon/Arabian Marine Contract ¶ 1 (emphasis supplied).

In sum, even if Waterman and Arabian Marine did not enter into their own written contract,[8] they were bound to each other by the agreements that Exxon, as agent, entered into with each of them. The Waterman/Exxon Contract was thus preliminary to a contract between Waterman and Arabian Marine for the sale of bunkers.

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8 The delivery receipt is a written document that can be considered a contract between Arabian Marine and Waterman. *See* Exxon/Arabian Marine Contract ¶ 9.

III. *The Extension of Credit*

Plaintiff also asks me to revisit the question whether admiralty jurisdiction can be based on the fact that Exxon furnished the Hooper with credit necessary to obtain the fuel. This contention was considered in my initial decision:

> [I]t might be argued that Exxon furnished the Hooper with the credit it needed to obtain the fuel, and thus was not a mere agent. . . . Defendant suggests, however, that a lien claimed by virtue of Exxon's extension of credit would arise only by subrogation, and would be governed by Saudi Arabian law. *See* Defendant's Memorandum of Law at 7-9. Although this may not be the case, *see Universal Shipping v. The Panamanian Flag Barge*, 563 F.2d 483, 484 (1st Cir.1976) (*dictum* distinguishing lien arising by subrogation when advance is given to discharge an existing lien from lien arising when advance is made for the purpose of permitting vessel to purchase other necessaries), plaintiff has not claimed a lien on the ground that it advanced the Hooper the funds needed to refuel, *see* Plaintiff's Reply Memorandum at 14. Moreover, the *Minturn* case itself involved a general agent who had "laid out" and "expended" funds for the ship "in paying for supplies." The Court nevertheless concluded that there was "nothing in the nature of a maritime contract in the case." *Minturn* [*v. Maynard*], 58 U.S. [477] at 477 [15 L.Ed. 235].

707 F.Supp. at 161.

Ordinarily, one who advances money to a ship for the purpose of satisfying an outstanding or future maritime lien, is entitled to a lien by virtue of subrogation. *The Emily B. Souder*, 84 U.S. (17 Wall.) 666, 21 L.Ed. 683 (1873); *see also* Ray, *Maritime Contract Liens*, 47 Tul.L.Rev. 587, 599 (1973) ("One who makes advances to pay for the necessaries that give rise to a maritime lien stands in the shoes of the supplier whose claim has been paid."). Such an advance is apparently considered a maritime contract.

Yet a brokerage contract, under which an agent provides services preliminary to a maritime contract, cannot be "bootstrapped" into admiralty jurisdiction simply because the agent has paid for the maritime services procured. Professor Moore explains:

> Can, for instance, an agent who has expanded his own money for maritime services or supplies furnished to the principal's vessel recover all, or the balance due, of such expenditures in a maritime action? While such agreements are not classic indemnity agreements, there is usually expressed or implied in such undertakings a provision that the agent will be indemnified for all reasonable expenses incurred on the principal's behalf. And, notwithstanding that indemnity agreements have been deemed maritime when contained in certain contracts, such as stevedoring, they have uniformly been deemed beyond the admiralty when between principals and agents.

Moore's ¶ 2.60[4] (footnotes omitted). Thus courts in this Circuit have held that general agency contracts are non-maritime, even where the agent has advanced funds for needed supplies. *See, e.g., Garcia & Diaz, Inc. v. Empresa Naviera De Cuba, S.A.*, 158 F.Supp. 147, 147 (S.D.N.Y. 1958) (case dismissed for want of admiralty jurisdiction: "The general rule, that [a general] agent acquires no maritime lien for payments made by it in the course of its business is well settled."). And, on apparently the same basis, Judge Haight has suggested that an insurance broker may not sue in admiralty to recover premiums advanced on the vessel owner's behalf. *Frank B. Hall & Co. v. S.S. Seafreeze Atlantic*, 423 F.Supp. 1205, 1209-10 (S.D.N.Y.1976).

Although the authorities do not explain the rationale underlying this principle, I believe that it can be understood as a means of limiting the use of maritime statutes, and in particular the granting of maritime liens, to cases where they are necessary to further maritime commerce. While "[m]oneys are not usually loaned to stangers, residents of distant and foreign countries, without security." *The Emily*

B. Souder, 84 U.S. at 671, federal intervention is not needed to induce a ship's agent, who has a continuing and substantial relationship with the owner or charterer of the vessel, to lay out funds. Indeed, while some courts have suggested that the important inquiry is not whether the advance itself is necessary, but whether the money has gone toward payment for a necessary, *see The Minnie & Emma*, 21 F.2d 991, 992 (D.Md.1927), there is no need to grant jurisdiction to brokers who advance the vessel funds in the ordinary course of the agency relationship. Even the Comment, once again relied on by plaintiff, admits that an agent may be disallowed a lien for advances if they are made "in the ordinary course of his agency." Comment at 620 n. 102.[9]

Exxon's extension of credit appears to have been incidental to its long-standing agency relationship with Waterman, which by itself would not be considered maritime. I am convinced that the admiralty jurisdiction should not be expanded to include the claim of Exxon, who, in the ordinary course of performing its long-term contract to procure bunkers for Waterman vessels, advanced funds for the fuel that it procured.

Exxon has failed to cite any binding authority to the contrary, and even the one case that it cites from this district, *Martran v. Steamship Co. v. Aegean Tankers Ltd.*, 170 F.Supp. 477 (S.D.N.Y.1959), is very different from the facts here. That case involved an owner's action against a subcharterer for fuel paid for by the owner. *Id.* at 478-89. The court did not discuss whether an agent that procures and pays for bunkers can bring a suit in admiralty against the

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9 Although the Comment concedes this point, its position on the issue of advances is otherwise at odds with the law of this Circuit.

> One acting as a special agent can assert a lien upon a vessel if his primary function is to procure and pay for necessary services and supplies. A general agent who fulfills the very same functions has at least an in personam right against an owner if he exercised a great degree of control over the vessel.
>
> . . . Under this approach, therefore, the contract in *Peralta* which involved an agreement to provide or pay for a number of necessary services, should have been found maritime.

Comment at 624 (footnote omitted).

vessel. I conclude that such cases are outside the admiralty jurisdiction.[10]

IV. *The Need for Further Evidence*

I see no reason to allow plaintiff to present further evidence regarding the nature of the Waterman/Exxon contract at this time. Plaintiff merely asserts the need for such a presentation, and offers no explanation as to how such a procedure might be helpful. "An opposing party's mere hope that further evidence may develop prior to trial is an insufficient basis upon which to justify the denial of the motion." *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir.1981) (quoting *Neely v. St. Paul Fire & Marine Insurance Co.*, 584 F.2d 341, 344 (9th Cir.1978) (Palmieri, J.)). The request is therefore denied.

CONCLUSION

For the reasons stated above, plaintiff's motion for reconsideration of my Opinion and Order dated March 3, 1989 is denied.

SO ORDERED.

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10 Since I am persuaded that Exxon cannot claim a subrogated lien, I need not reach the question of whether such a lien would exist under Saudi Arabian law. Consequently, Exxon's request to submit evidence on Saudi Arabian law is denied.

Appendix C

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

March 3, 1989

No. 86 Civ. 9445 (WCC)

EXXON CORPORATION,

Plaintiff,

v.

CENTRAL GULF LINES, INC., in personam and the M/V GREEN HARBOUR (ex William Hooper) in rem, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., in rem.,

Defendants.

Nourse & Bowles, New York City (Armand M. Pare, Jr., of counsel), for plaintiff.

Bigham Englar Jones & Houston, New York City (Francis A. Montbach, Karin A. Schlosser, of counsel), for defendants.

OPINION AND ORDER

WILLIAM C. CONNER, *District Judge*.

This is an *in rem* action to enforce maritime liens under 46 U.S.C.App. § 971. Plaintiff alleges that it has not been paid for bunker fuel furnished to defendant's vessel in Saudi

Arabia and New York, and that it is therefore entitled to liens. Defendant contends that no enforceable liens exist. The parties have cross-moved for summary judgment pursuant to Rule 56, Fed.R.Civ.P. Plaintiff's lien claim for the delivery in Saudi Arabia is dismissed for want of admiralty jurisdiction. Judgment is granted in plaintiff's favor, however, with respect to the fuel delivered in New York.

BACKGROUND

Defendant Central Gulf Lines, Inc. ("Central Gulf") is the owner of a vessel, the Green Harbour ex William Hooper (the "Hooper"). The Hooper was built in the United States with subsidies and financing provided by the federal government. She is classified by the American Bureau of Shipping, and flies the United States flag. Her port of registry is New Orleans, Louisiana.

The Hooper was chartered by a bareboat charter party to the Waterman Steamship Corporation ("Waterman"). Waterman used the Hooper in its U.S. flag common carrier service between ports in the United States and ports in the Middle East.

For forty years, plaintiff Exxon Corporation ("Exxon") was Waterman's exclusive worldwide supplier of gas and bunker fuel oil. Waterman and Exxon negotiated a marine fuel requirements contract in 1983. The unsigned document set minimum and maximum purchase limits. It provided that the fuel would be provided by the "Seller" (Exxon) or by "Supplying Companies, referred to in Seller's 'International Contract Price List for Marine Fuel Delivered as Ships' Bunkers.' " Exhibit 3 to Affidavit of James E. Sharkey.

When Waterman wished to make a purchase pursuant to this agreement, it telephoned Exxon, providing the details of the vessel to be bunkered and the place and approximate time of loading. Exxon would either effect delivery on its own, or direct its local supplier to deliver the bunkers to the vessel. Exxon would invoice Waterman for the fuel supplied, and if a local supplier was used, pay its supplier.

Apparently, Exxon did not rely on local suppliers when providing ships with fuel in New York. Exxon alleges that on October 7, 1983, it supplied the Hooper with 41.929 tons of gas oil in New York. Exxon invoiced Waterman for $13,241.63 on October 18, 1983.

Whenever Exxon procured bunker fuel for Waterman vessels at the port in Jeddah, Saudi Arabia, it used a local supplier, Arabian Marine Operating Co., Ltd. ("Arabian Marine"). The agreement controlling the relationship between Exxon and Arabian Marine provided that: "Exxon shall solicit and arrange for the sale of marine fuels to international customers having bunkering requirements at the port of Jeddah. Arabian Marine shall supply marine fuels to those customers nominated by Exxon." In return for Exxon's services, Arabian Marine agreed to pay Exxon a "commission." Under the terms of the agreement, Exxon would never actually own the fuel. "Title to all fuel delivered by Arabian Marine to the nominated customers solicited by Exxon will pass directly from Arabian Marine to the customer at the flange of the receiving vessel." Exhibit 4 to Affidavit of James E. Sharkey.

Around January, 1982, Arabian Marine began providing its customers with certain discounts at Jeddah. Since Exxon's company policy did not permit it to participate in this practice in Saudi Arabia, it suggested that Waterman make its own arrangements for price and supplies. Waterman elected to negotiate directly with Arabian Marine. Exhibit 4 to Affidavit of James E. Sharkey.

As of this time, Exxon was no longer involved in Waterman's purchase of bunkers in Jeddah. As a matter of courtesy to their long-time customer, Exxon allowed Waterman to use its communications system so that Waterman could more easily transmit its orders to Arabian Marine. Exxon was no longer informed of the specifics of these deliveries, and received no payments on account of them.

On September 29, 1983, Waterman placed an order with Arabian Marine for the delivery of bunker fuel to be delivered to the Hooper in Jeddah on October 25, 1983. In mid-October, 1983, Arabian Marine informed Exxon that, due to

Waterman's financial condition, it would no longer deal directly with Waterman, and suggested that the previous arrangement be restored. Exxon consented. On October 26, 1983, Arabian Marine delivered 4,242.47 tons of bunker fuel oil to the Hooper pursuant to the original agreement. Exxon was invoiced for this delivery on October 31, 1983. The invoice was paid by Exxon on November 15, 1983. Waterman was invoiced for $763,644.60 on November 8, 1983.

Waterman filed a Chapter 11 reorganization proceeding on December 1, 1983. On November 14, 1984, Exxon, Central Gulf, and Waterman reached an agreement under which Central Gulf consented to assume personal liability for the deliveries if this Court decides that the Hooper is liable *in rem* on account of the deliveries. Central Gulf also provided Exxon with a letter of credit as security for its promise.

A reorganization plan for Waterman was confirmed on June 19, 1986. It entitled Exxon to pursue this claim. Exxon has received, under the reorganization plan, certain cash and stock dividends. Exxon admits that its claim should be diminished by the amount that it receives under the reorganization plan.

DISCUSSION

Standard for Summary Judgment

A party seeking summary judgment must demonstrate that "there is no genuine issue as to any material fact." Fed.R. Civ.P. 56(c); *Knight v. U.S. Fire Insurance Company*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1570, 94 L.Ed.2d 762 (1987). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). It must demonstrate that there is a "genuine issue for trial." Id. at 587, 106 S.Ct. at 1356. "In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there

are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight* 804 F.2d at 11. The inquiry under a motion for summary judgment is thus the same as that under a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

Choice of Law

Plaintiff Exxon contends that American law should govern whether maritime liens exist in this case. Defendant does not oppose this contention. I agree that this case should be decided according to American law. The United States has a significant interest in this case. The shipowner, the charterer, the ship, and the plaintiff were all American. On the other hand, Saudi Arabia has no interest in having its law apply in this case. The only foreign participant in this transaction, Arabian Marine, was not injured. *See Lauritzen v. Larsen*, 345 U.S. 571, 582-90, 73 S.Ct. 921, 928-32, 97 L.Ed. 1254 (1953); *Rainbow Line, Inc. v. M/V Tequila*, 480 F.2d 1024, 1026-27 (2d Cir.1973).

The Maritime Liens

Plaintiff Exxon claims that it is entitled to liens under Section 30, Subsec. P of the Federal Maritime Lien Act (the "Act"). The Act provides, in pertinent part:

> Any person furnishing . . . supplies . . . or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

46 U.S.C.App. § 971.

Defendant Central Gulf denies the existence of the Saudi Arabia lien on three alternative grounds: (1) Exxon did not "furnish" the Hooper with bunker fuel in Jeddah; (2) Exxon's intervention in the Jeddah transaction was a response to Arabian Marine's request, not Waterman's "order"; and (3) Exxon did not rely on the credit of the Hooper. Defendant denies the existence of the New York lien on the ground that there is no proof that Exxon delivered gas to the Hooper in New York.

Among the cases cited by defendant in support of its contention that Arabian Marine, not Exxon, "furnished" the bunker fuel in Jeddah is *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir.1984), *cert. denied*, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985). While defendant does not frame its argument in jurisdictional terms, I am persuaded that *Peralta* deprives me of admiralty jurisdiction over Exxon's Saudi Arabian claim. On the other hand, defendant's defense with respect to the New York delivery is meritless. Plaintiff is thus entitled to judgment on that claim.

The Saudi Arabian Delivery

A prerequisite to the existence of a maritime lien based on a breach of contract is that the subject matter of the contract must fall within the admiralty jurisdiction. *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660, 666 (11th Cir. 1987); *The Walter Adams*, 253 F. 20, 24 (1st Cir.1918) ("A contract cannot afford the necessary basis for a maritime lien, unless it is maritime in its nature, so as to be cognizable in admiralty . . . ."), *aff 'd sub nom. Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97 (1920); G. Gilmore & C. Black, *The Law of Admiralty* § 9-20 (2d ed.1975) [hereinafter Gilmore & Black] ("To give rise to a lien a claim must be in first instance maritime. Thus we recur to the question of what is within the jurisdiction of the admiralty . . . ."); 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ C.02 (2ded. 1988) (a "Court must act within its admiralty jurisdic-

tion in hearing" a proceeding to execute a maritime lien); *id.* ¶ C.03 ("Obviously to give rise to a maritime lien, the occurrence out of which the loss, injury or dispute arose must itself be maritime. That means that the occurrence must be within the admiralty jurisdiction of the United States as established by the Constitution and adopted by the Congress."); *id.* ¶ C.05 ("maritime liens may arise from the breach of contracts that are maritime in nature"); T. Schoenbaum, *Admiralty and Maritime Law*, § 3-2 (1987) (maritime liens are recognized only when the case comes within the admiralty jurisdiction); *c.f. United States v. Pacific Far East Lines, Inc.*, 809 F.2d 1435, 1437-38 (9th Cir.1987) (claims of employee association for loss of pay and benefits by shoreside employees were not maritime in nature and, consequently, could not give rise to a maritime lien.)

While admiralty jurisdiction provides "fairly complete coverage of the primary operational and service concerns of the shipping industry," there still exist "a few anomalous exceptions." Gilmore & Black § 1-10. One of these exceptions is the rule that agency contracts under which a party agrees to solicit or procure freight, passengers, crew, or supplies for a vessel are not maritime contracts. The Second Circuit in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir.1984), *cert. denied*, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985), recently refused to discard this exception. The *Peralta* court welcomed a reevaluation by the Supreme Court, but felt bound by the Court's ruling in *Minturn v. Maynard*, 58 U.S. (17 How.) 476, 15 L.Ed. 235 (1854). 739 F.2d at 804. The Supreme Court declined the Second Circuit's invitation to overrule *Minturn*. *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985) (Brennan, Marshall & Blackmun, JJ., would have granted certiorari).

The defendant in *Peralta* was hired as the husbanding agent for vessels calling on certain ports, and provided services such as arranging for fuel, water, provisions, customs clearance, and stevedoring. For the most part, the defendant employed others to perform services on the vessel, although

at the port of New Orleans, the defendant "hired" itself to act as stevedore. The Second Circuit found that the defendant performed merely "preliminary" services leading to a maritime contract, not cognizable in admiralty. Quoting an early Southern District case, *The Thames*, 10 F. 848 (S.D.N.Y.1881), the Court of Appeals explained:

> The distinction between preliminary services leading to a maritime contract and such contracts themselves have been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker must follow,—the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed.

739 F.2d at 801-02. The court explicitly declined to circumvent *Minturn* by distinguishing it or carving exceptions out of its rule. It rejected, for example, the notion that services necessary for a continuing voyage fall within admiralty jurisdiction. *Id.* at 803 & n. 4. The court held to its previous holdings that agency contracts are not maritime in nature.

Applying the principles enunciated in *Peralta* to the facts at hand, it is evident that Exxon's arrangement to procure fuel for the Hooper in Saudi Arabia was not a maritime contract. Admittedly, Exxon's contract with Waterman is not called an "agency contract." Indeed, it refers to Exxon as a "seller," not a procurer, of marine fuel. Yet "the focus of our inquiry must not be on the name assigned to the contract, but rather on the nature of the services to be performed." *Ingersoll Milling Machine Co. v. M/V Bodena*, 829 F.2d 293, 302 (2d Cir.1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 774, 98 L.Ed.2d 860 (1988).

Under the contract, Exxon served in two distinct capacities. Its first role was as a supplier of marine fuels. When Water-

man vessels called at ports where Exxon maintains its own bunker stations, Exxon promised to physically deliver the bunkers. When the vessels, however, called at ports where Exxon depends on local suppliers, Exxon promised to arrange for the local suppliers to provide Waterman ships with fuel. When acting in this latter capacity, Exxon was merely Waterman's agent.

Exxon wore its agency hat when it procured bunkers for the Hooper in Jeddah. Its services with respect to the Jeddah delivery included taking Waterman's order, contacting Arabian Marine, maintaining a bunkers contract with Arabian Marine, and advancing Waterman the purchase price by paying Arabian Marine. It never actually possessed the fuel that was supplied to the Hooper at Jeddah. Indeed, pursuant to Exxon's contract with Arabian Marine, title to the fuel passed directly from Arabian Marine to the Hooper. In return for these services, Exxon received a commission which was deducted from Arabian Marine's invoice to Exxon. In sum, Exxon's role in the transaction was strictly "shoreside," *E.S. Binnings*, 815 F.2d at 664. As Exxon put it in its discussion of the choice of law issue, the locus of Exxon's relationship with Waterman was the United States, not the dock in Jeddah. *See* Plaintiff's Memorandum of Law at 16. Exxon's services were thus "preliminary"; they ended before the bunkers reached the Hooper.

Peralta did not involve the Federal Maritime Lien Act, and the court left open the question of whether the agency contract exception applies to suits brought under the Act. *See Peralta*, 739 F.2d at 800 & n. 2 ("Congress [through the Federal Maritime Lien Act] has expressly included certain transactions or events within admiralty.") It is well-settled, however, that Congress did not intend to expand admiralty jurisdiction through the Act. In *E.S. Binnings*, the Eleventh Circuit addressed the question of whether "a maritime lien can arise and be enforced under the [Act] although the underlying contact would not be considered maritime." 815 F.2d at 666. The court concluded that although Congress "may extend the admiralty jurisdiction to areas not formerly included within it," there is "no indication . . . that the

[Act] was intended to enlarge the admiralty jurisdiction to include agency contracts." *Id.* Indeed, shortly after the Act was adopted, Justice Brandeis, quoting the legislative reports, declared that the Act "makes no change in the general principles of the present law of maritime liens." *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 11, 41 S.Ct. 1, 4, 65 L.Ed. 97 (1920); *see also New Bedford Dry Dock Co. v. Purdy*, 258 U.S. 96, 98-99, 42 S.Ct. 243, 244, 66 L.Ed. 482 (1922) (party claiming lien under the Act must establish that agreement was maritime in that it involved repairs, not original construction). Professors Gilmore and Black are quite clear on this point: "*Assuming its maritime nature,* almost any type of service claim will today be held within the Lien Act. . . ." Gilmore & Black § 9-35 (emphasis added).

Exxon's attempt to distinguish this case from the agency contract cases must be rejected. While it is true that *Peralta* involved a general agency, and that there are *dicta* that agents who arrange for the supply of bunkers may sue in admiralty, *see, e.g., Tramp Oil & Marine Ltd. v. M/V Mermaid I*, 630 F.Supp. 630, 633 (D.Puerto Rico) ("Exxon and Colonial, as direct suppliers, would be the ones entitled to the protection of the maritime lien provisions of section 971."), *aff'd* 805 F.2d 42 (1st Cir.1986) ("Exxon . . . caused Colonial . . . to supply the oil to the Mermaid. . . . No one disputes that Exxon and Colonial as direct suppliers of the fuel to the Mermaid would be entitled to a maritime lien."), any distinction between a husbanding agent and a bunkering agent is untenable. "[I]t would be anomalous to hold that a general agency agreement" to, among other things, arrange for fuel supplies "is outside admiralty, while an agreement between a principal" and an agent who has procured bunkers for the vessel "falls within the grant of jurisdiction." *See Continental Cameras Co. v. FOA & Son Corp.*, 658 F.Supp. 287, 289 (S.D.N.Y.) (Sand, J.) (insurance broker), *aff 'd* 831 F.2d 45 (2d Cir.1987) (per curiam); *see also Boyd, Weir & Sewell, Inc. v. Fritzen-Halcyon, Lijn, Inc.*, 709 F.Supp. 77 (S.D.N.Y.1989) (Cannella, J.) (chartering agent).

As a way of getting around the jurisdictional difficulty in this case, it might be argued that Exxon furnished the Hooper with the credit it needed to obtain the fuel, and thus was not a mere agent. That Exxon advanced the Hooper needed cash is admitted by Central Gulf. Defendant's Memorandum of Law at 19-20 ("Exxon acted, as a guarantor of payment under the bunkering agreement . . ."). Defendant suggests, however, that a lien claimed by virtue of Exxon's extension of credit would arise only by subrogation, and would be governed by Saudi Arabian law. *See* Defendant's Memorandum of Law at 7-9. Although this may not be the case, *see Universal Shipping v. The Panamanian Flag Barge*, 563 F.2d 483, 484 (1st Cir.1976) (*dictum* distinguishing lien arising by subrogation when advance is given to discharge an existing lien from lien arising when advance is made for the purpose of permitting vessel to purchase other necessaries), plaintiff has not claimed a lien on the ground that it advanced the Hooper the funds needed to refuel, *see* Plaintiff's Reply Memorandum at 14. Moreover, the *Minturn* case itself involved a general agent who had "laid out" and "expended" funds for the ship "in paying for supplies." The Court nevertheless concluded that there was "nothing in the nature of a maritime contract in the case." *Minturn*, 58 U.S. at 477.

Although this Court has construed the Federal Maritime Lien Act broadly to further its "stated purpose of fostering marine commerce," *Itel Containers International v. Atlantrafik Express Service*, 668 F.Supp. 225, 230 (S.D.N.Y.1987) (Carter, J.), I cannot disregard the advice of the Second Circuit that creating exceptions to the agency contract rule based on "hairsplitting distinctions would blur, if not obliterate, a rather clear admiralty distinction." *Peralta*, 739 F.2d at 804. I therefore hold that Exxon's agreement to procure fuel for the Hooper at Jeddah falls outside of the admiralty jurisdiction of this Court. Since a maritime lien under Section 971 cannot arise out of nonmaritime contracts, Exxon's claim for a $763,644.60 lien for the Jeddah fuel delivery is dismissed.

The New York Delivery

Exxon was the supplier, not agent, with respect to the New York delivery. Its $13,241.63 claim therefore falls within the admiralty jurisdiction. Central Gulf's only defense with respect to this delivery is that Exxon has failed to prove it. I find that there is no genuine issue of material fact as to the existence of the New York delivery, and grant summary judgment in plaintiff's favor on this claim.

"In order for a contract to be within the admiralty jurisdiction, either it must be wholly maritime or its nonmaritime elements must be insubstantial or separable." *E.S. Binnings*, 815 F.2d at 665. "The substantial question is whether the maritime obligations can be separately enforced without prejudice to the rest." *Compagnie Francaise de Navigation a Vapeur v. Bonnasse*, 19 F.2d 777, 779 (2d Cir.), *cert. denied*, 275 U.S. 551, 48 S.Ct. 114, 72 L.Ed. 421 (1927).

The contract between Exxon and Waterman can be divided into the separate fuel orders. Each delivery was a separate occurrence; Exxon sent Waterman a separate bill for each transaction. Moreover, the deliveries could be divided into two groups: a first, in which Exxon relied on local suppliers to provide Waterman ships with the bunkers; and a second, in which Exxon delivered its own fuel to the vessels.

Central Gulf has failed to produce any credible evidence controverting Exxon's contention that it delivered bunkers to the Hooper in New York, and the evidence submitted by Exxon is sufficient to warrant summary judgment in its favor. Central Gulf admits that around October 7, 1983, the Hooper requested Exxon to supply it with fuel in New York. It claims however, that the "bunkers were, in fact, delivered to the vessel by a supplier other than Exxon." Affidavit of Francis A. Montbach ¶ 6. Apparently, Central Gulf's belief that Exxon did not deliver the fuel is based on Exxon's failure "to produce even the most crucial piece of evidence; the delivery receipt." Central Gulf's Reply Memorandum at 16. Exxon admits that "no bunker receipt . . . has been found despite a diligent search." Exxon's Reply Memorandum at 2, but has supplied the Court with affidavits asserting that the

delivery took place. Adam Rudzki, a Credit Manager at Exxon, disputes that "the fuel oil delivered to the WILLIAM HOOPER in New York on January 7, 1983 was made by an entity other than Exxon," and swears that the delivery "was made by Exxon Company, U.S.A. which was then, and still is, an unincorporated division of Exxon Corporation." To this defendant responds that "Mr. Rudzki, who is not a marine salesman, . . . must have obtained such knowledge from business records kept by Exxon." Central Gulf's Reply Memorandum at 16. Yet James Sharkey, who *is* a marine salesman for Exxon, also swears that "[i]n accordance with [the Hooper's] request, Exxon delivered the gas oil in question and subsequently invoiced Waterman (and the vessel) for this." Affidavit of James E. Sharkey ¶ 12. Ironically, the only affidavit that defendant submits to dispute Exxon's evidence is that of Francis Montbach, the attorney who represents Central Gulf in this litigation, and who has no personal knowledge of the transaction.

If this evidence were to be submitted at trial, no reasonable jury could find in favor of defendant. "Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Central Gulf has failed to overcome Exxon's proof of delivery with evidence of its own. At most, it has raised no more than a "metaphysical doubt" as to the delivery in New York. *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356. A trial is not warranted on this issue. Summary judgment is granted in plaintiff's favor as to its claim for a $13,241.63 lien with respect to the New York delivery.

CONCLUSION

For the reasons stated above: (1) plaintiff's claim for a lien of $763,644.60 with respect to the Jeddah delivery is denied for lack of admiralty jurisdiction; and (2) plaintiff's claim for

a lien of $13,241.63 with respect to the New York delivery is granted. In accordance with Exxon's agreement with Central Gulf, plaintiff's recovery will be reduced by certain amounts Exxon received under the reorganization plan. Settle judgment on two weeks' notice.

SO ORDERED.

Appendix D

AGA Progas a s
AT&S Exploration Ltd.
Abu Dhabi Company for Onshore Oil Operations
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C.A.
Adria-Wien Pipeline Gesellschaft
mit beschrankter Haftung
Aircraft Fuel Supply B.V.
Aishin Sekiyu K.K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Arabian American Oil Company Aramco
Aramco Overseas Company
Aramco Services Company
Aromatics (Thailand) Company Limited, The
Asakawa Sekiyu K.K.
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.

BEB Erdgas und Erdoel GmbH, BEB
Hannover
BT Asia
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bardwell SA/NV
Bayerische Erdgasleitung G.m.b.H.
Beaverhill Resources Limited
Bel-Air Entreposage S. A.
BRIGITTA Erdgas und Erdoel GmbH. Brigitta
Hannover

Bryan Woodbine Gathering Inc.
Byron Creek Collieries (1983) Limited

Canadian Reserve Oil & Gas Ltd.
Carlew Inc.
Carlisle SA/NV
Carnduff Gas Limited
Cary Chemicals, Inc.
Cascade Fertilizers (1990) Limited
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation
Pte. Ltd.
Chinchaga Resources Limited
Chuo Sekiyu Hanbai K.K.
Clermont Coal Mines Limited
Comcor Chemicals Limited
Commercial Polymers Pty. Ltd.
Compania de Operaciones Portuarias Limitada
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oyonnaxien des Combustibles
Computer Centrum Groningen B.V.
Cynthia Gas Gathering Company Limited

DFTG Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K.K.
Daito Gas K.K.
Demulsificantes Del Orinoco, C.A. DEMORCA
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine TAL-Germany
Oelleitung G.m.b.H.
Devon Estates Limited
Divafi Pty. Limited

Dixie Pipeline Company
Dukhan Service Company

ERC Malaysia Inc.
E S F Limited
Eagle Kenso K.K.
East Texas Salt Water Disposal Company
Eastcoast Spill Response Inc.
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Elwerath Hannover
Elwerath Erdoel und Erdgas AG
Emirates Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.b.H.
Energie Marketing Service GmbH
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft m.b.H
Esso Chemical Alberta Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola, Inc.
Esso Exploration and Production Ireland Limited
Esso Malaysia Berhad
Esso of Canada Limited
Esso (Overseas) Pension Trust Limited
Esso Portuguesa, S.A.
Esso Resources Canada an Alberta limited partnership
Esso Resources Canada Limited
Esso Resources Enterprises Ltd.
Esso Resources N.W.T. Limited
Esso Resources (1989) Ltd.
Esso Resources Properties Inc.
Esso Resources Ventures Limited
Esso Societe Anonyme Francaise Esso France/ESAF
Esso Standard Algerie S. A.
Esso Standard Tunisie S. A.
Esso Technologies et Services (E.T.S.)

Etablissements Cloarec
Exact Reisebyra A/S
Exxon Chemical Pakistan Limited
Exxon de Colombia S.A.
Exxon Supply Company

F.T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.

Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K. GSK
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas, Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane—Lavera
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Erdoel-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas and Erdoel GmbH
Gewerkschaft Kuechenberg Erdgas und Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Grande Ecaille Land Company, Inc.
Great Eastern Oil Limited
Groupement d'Exploitation du Depot de Reception de Chennevieres (G.E.D.R.C.)
Groupement Immobilier Petrolier
Groupement Liants Routiers du Gard Esso-ViaFrance (G.L.R.G.E.V.)
Groupement Petrolier Aviation
Groupement Petrolier de la Cote Azur
Groupement Petrolier de Nantes (G.P.N.)
Groupement Petrolier du Finistere G.I.E.

Hamburger Geswerke GmbH
Hannoversche Erdoelleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.

Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokushin Bussan K.K.
Hokuyu Sekiyu K.K.
Home Energy Company Ltd.
Home Oil Company Limited
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft

Imperial Oil Limited Imperial
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Intamix Corporation
Interhome Energy Inc.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line (NW) Ltd.
Intoplane Service Company Limited
Iranian Oil Participants Limited Iranian Consortium
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited IPC
Iraq Petroleum Pensions, Limited

Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.

K.K. Aizu General
K.K. Chubu Toresen
K.K. Daimaru
K.K. General Sekiyu Hanbaisho

K.K. Genetech
K.K. Heian Sekiyu
K.K. ito
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Agnecy
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhè-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihan Sekiyu K.K.
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K.K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E.P. Rubber Co., Ltd.
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K.K.
Kygnus Sekiyu Seisei Kabushiki Kaisha
Kyushu Eagle K.K.

L12a (Groep) B.V.
L12b/L15b (Groep) B.V.
L15a (Groep) B.V.
LPL Investments, Inc.
La Societe Acadienne de Recherches Petrolieres
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft fuer luzernisches Erdoel
Les Docks des Petroles d'Ambes
Lilac Sekiyu Kabushiki Kaisha
Long Beach Oil Development Company

Maasvlakte Coal Terminal B.V.
Maasvlatke Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Manito Pipelines Ltd.
Maple Leaf Petroleum Limited
Maruei Gas K.K.
Maruei Service K.K.
Marugo Gas K.K.
McColl-Frontenac Inc.
McColl-Frontenac Oil Co. Ltd.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Minerals Limited
Mittelrheinische Erdgas Transport
Gesellschaft mit beschraenkter Haftung
Montreal Pipe Line Limited/
Les Pipe-Lines Montreal Limitee
Mount Thorley Coal Loading Limited
Mr. Lube Canada Inc.
Mytex Polymers Incorporated

NAM - K 7 B.V.
NAM - K 14 B.V.

NAM - K 15 B.V.
NAM-17 B.V.
NAM/CLOMS - K 8/K 11 B.V.
NAM/CLOMS - L 13 B.V.
NAM/MOBIL M9a B.V.
NPC Services, Inc.
N. V. Nederlandse Gasunie Gasunie
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Nanseki Kaihatsu K.K.
Native Venture Capital Co. Ltd.
Near East Development NEDC
Corporation
Nederlandse Aardolie NAM
Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
Nichiel Kogyo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Nogat B.V.
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft
mit beschrankter Haftung
Noroxo
Northward Developments Ltd.
Nottingham Gas Limited

107580 Canada Inc.
151742 Canada Inc.
159129 Canada Inc.
150440 Canada Limited
160837 Canada Limited
165548 Canada Limited
165549 Canada Limited

165550 Canada Limited
165899 Canada Limited
168211 Canada Limited
Office Prive d' Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oil Transport Company (Saudi Arabia) Limited
Oldenburgische Erdoel Gesellschaft m.b.H.
OSLO Alberta Limited
Osaka Ashyu Nenryou K.K.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K.K.

P.A.C. S.A.R.L. (Pinson-Allegret-Causco)
P.T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pioneer Kosan Kabushiki Kaisha
Pipe Line Services, Inc.
Plantation Pipe Line Company
Portland Pipe Line Corporation
Primaer Oel GmbH
Progas Limited

Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Regulus Holding (Singapore) Pte. Ltd.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)

Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Ruhrgas Aktiengesellschaft

S.A. du Pipeline a Produits Petroliers sur Territoire Genevois (SAPPRO)
S.A.R.L. Viain
Saitama Sekiyu Hanbai K.K.
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Scurry-Rainbow Oil Limited

204383 Enterprises Limited
363011 Alberta Limited
369772 Alberta Inc.
393193 Alberta Inc.
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nuernberg mbH
TGF Tankdienst Gesellschaft Frankfurt
TGM Tankdienst Gesellschaft Munchen
Taglu Enterprises Limited
Taihei Bussan K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Takahama Kosan Kabushiki Kaisha
Taketsura Yugyo K.K.
Tankanlage A.G. Mellingen
Tanklager Altishausen A.G.
Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
Tecnica Quimica Petrolera, S.A. de C.V.
Tecumseh Gas Storage Limited
Texaco Canada Malaysia Inc.
Thai Aliphatics Company Limited
THUMS Long Beach Company
Thyssengas G.m.b.H. Thyssengas
TIBA Speditions GmbH

Tohko Plastics Company, Limited
Tohpren Co., Ltd.
Tojo Gas K.K.
Toko Sekiyu K.K.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Energy International Corp.
Tonen Kabushiki Kaisha
Tonen Properties Inc.
Tonen Sekiyukagaku Kabushiki Kaisha
Tonen Sogo Service Co., Ltd.
Tonen System Plaza Kabushiki Kaisha
Tonen System Service Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Tapyrus Company Limited
Tonen Technology K.K.
Tonex Company Limited
Tophus Quen Pty. Ltd.
Towa Compounding Co., Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Oelleitung in TAL-Austria
Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company Tapline
Trans-Northern Pipelines Inc.
Transgaz Lavera
Trimin Resources Inc.
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited

UBAG - Unterflurbetankungsanlage Flughafen Zurich
Ulan Coal Mines Limited
Ulan Coal Shippers Pty. Limited
United Collieries Pty. Limited
United Industry Development

Van Salt Water Disposal Company

W.A.G. Pipeline Proprietary Limited
Wako Jushi Kabushiki Kaisha

Wako Kasei Kabushiki Kaisha
Warmtepomp Nederland B.V.
Westdeutsche Erdoelleitungs-G.m.b.H.
Westgas G.m.b.H.
Winnipeg Pipe Line Company Limited
Worex S.N.C.

Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshiki Sekiyu Kabushiki Kaisha
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Yugen Kaisha Nishi Kobe Bosai Center